Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of SBC Communications Inc.'s Petition for Forbearance Under 47 U.S.C. § 160(c)	WC Docket No. 03-235

REPLY COMMENTS OF SBC COMMUNICATIONS INC.

GARY L. PHILLIPS
CHRISTOPHER HEIMANN
SBC COMMUNICATIONS INC.
1401 I Street, N.W.
4th Floor
Washington, D.C. 20005
(202) 326-8903

GEOFFREY M. KLINEBERG
COLIN S. STRETCH
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036-3209
(202) 326-7900

Counsel for SBC Communications Inc.

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INTRODUCTION AND SUMMARY

The D.C. Circuit made clear in *USTA* that unbundling is not an unalloyed good – rather, "[e]ach unbundling of an element imposes costs of its own, spreading the disincentive to invest in innovation and creating complex issues of managing shared facilities." *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 427 (D.C. Cir. 2002) ("*USTA*"), *cert denied*, 123 S. Ct. 1571 (2003). This Commission understood this clearly when it recognized in the *Triennial Review Order*[1] that "[t]he D.C. Circuit . . . cautioned the Commission against imposing the costs of unbundling if doing so would not bring on a significant enhancement of competition." 18 FCC Rcd at 17133, ¶ 256 n.760. "[W]hen lack of access to an incumbent LEC network element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic," *id.* at 17035, ¶ 84, then, according to this Commission, the benefits of unbundling outweigh its costs. But where the Commission has found no impairment, the costs outweigh the benefits, and requiring the unbundling of such a network element – whether pursuant to section 251(d)(2), section 271(c)(2)(B), or any other provision of law – would constitute both "bad policy and bad law." *Id.* at 17505 (separate statement of Chairman Powell).

It follows from these principles that, once this Commission has concluded that CLECs would not be "impaired" without unbundled access to a particular element, the conditions mandating forbearance are satisfied: (1) enforcement of the unbundling obligation would not be necessary to ensure that charges and practices are just and reasonable, because competition will

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[1] Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, 18 FCC Rcd 16978 (2003) ("*Triennial Review Order*"), *petitions for mandamus and review pending, United States Telecom Ass'n v. FCC*, Nos. 00-1012, 00-1015, 03-1310 *et al.* (D.C. Cir.).

set the market price; (2) enforcement of the unbundling obligation is not necessary for the protection of consumers, because consumers will have choices among competing facilities-based providers facing no barriers to entry; and (3) forbearance from applying the unbundling obligation is consistent with the public interest, because it will reduce the costs of unnecessary unbundling – costs measured both in terms of disincentives to invest in innovative technologies and in terms of the practical difficulties of administering leased facilities.

This is particularly true in the context of broadband facilities. Indeed, no less an authority than AT&T has observed the "universally accepted" "fundamental economic truth" that, as a general matter, mandatory access obligations come at the high cost of stifling facilities investment.[2] And, as AT&T has stressed, that "fundamental economic truth" is particularly applicable in the broadband marketplace. "Competition in the nascent broadband Internet services business is thriving," AT&T has explained, and there is no "serious risk of abuse of a bottleneck monopoly."[3] As a result, "[c]ompetition and marketplace forces will quite simply yield procompetitive and pro-consumer outcomes far more effectively than could any regulatory requirements," thus mandating a "hands-off" policy.[4]

The CLECs opposing this Petition have no answer to this essential economic reality. Indeed, they have willingly embraced this argument when it has suited their purposes. Instead, they spend the bulk of their efforts arguing that sections 10(d) and 271(d)(4) present legal obstacles to this Commission's authority to act on the Petition. But these legal arguments are entirely unpersuasive. Section 10(d) expressly provides that the Commission may forbear from

[2] Comments of AT&T Corp. at 42, 68-69, GN Docket No. 00-185 (FCC filed Dec. 1, 2000) ("AT&T Open Access Comments").

[3] *Id.*

[4] *Id.* at 2, 42.

applying the requirements of section 271 once it determines that the requirements in question have been fully implemented; now that the competitive checklist has been fully implemented in each of the states within SBC's region, section 10(d) presents no obstacle to this Commission's forbearance authority. At the very least, a checklist requirement regarding a particular network element has been "fully implemented" when this Commission has concluded that CLECs are not impaired without access to that network element.

Likewise, section 271(d)(4), which prohibits the Commission from limiting or extending the competitive checklist, applies only at the time the Commission is reviewing a Bell company application to determine whether the applicant has "fully implemented the competitive checklist in subsection (c)(2)(B)." 47 U.S.C. § 271(d)(3)(A)(i). Indeed, were it otherwise, the Commission might never be able to forbear from enforcing the requirements of the competitive checklist, which is directly contrary to section 10(d)'s delineation of the circumstances in which the Commission *can* forbear from enforcing those requirements.

ARGUMENT

I. The Commission Should Forbear from Enforcing Any Section 271 Unbundling Obligations with Respect to Elements That the Commission Has Determined Do Not Meet the Impairment Test Under Section 251

SBC's Petition hinges on one core point: where the Commission concludes that CLECs are not impaired without access to a particular element, it reflects a determination that the element is "[]suitable" for competitive supply.[5] *See USTA*, 290 F.3d at 427. As the D.C. Circuit

[5] For the reasons contained in BellSouth's petition for reconsideration of the *Triennial Review Order*, SBC believes that the Commission was incorrect when it concluded that the obligations to provide access to particular network elements under section 271(c)(2)(B) survive a determination that those same network elements need not be unbundled under section 251. *See* Petition at 1-2. The Commission should grant BellSouth's petition on this issue; if it does not grant reconsideration, however, the Commission should grant SBC's Petition for Forbearance.

has explained – and as the Commission has now acknowledged – in such circumstances, unbundling is not only unnecessary, it is *affirmatively harmful*. It imposes substantial costs – not least of which are the costs associated with "complex issues of managing shared facilities" – "where [there is] no reason to think doing so would bring on a significant enhancement of competition." *Id*. at 427, 429. And it frustrates the Act's central goal of "facilities-based competition," *Competitive Telecomms. Ass'n v.FCC*, 309 F.3d 8, 16 (D.C. Cir. 2002) ("*CompTel*"), by "reduc[ing] or eliminat[ing] the incentive" for ILECs *and* CLECs "to invest in innovation," *USTA*, 290 F.3d at 424.

Where the Commission concludes that CLECs are *not* impaired without access to a particular facility, the forbearance requirements set forth in section 10 are met, and the Commission accordingly must forbear from enforcing any lingering unbundling obligations contained within section 271. Those forbearance requirements require the Commission to ask a series of questions – relating to the terms under which a telecommunications service is offered, whether consumers are adequately protected, and whether the public interest is served, *see* 47 U.S.C. § 160(a) – that share a common strand: whether the regulation in question is "*necessary*" to protect consumers and competition. *Id.* (emphasis added).[6] Under the principles outlined above, where CLECs are not impaired without access to a network element, unbundling of that network element cannot be considered "necessary" to that purpose. Rather, as the Commission has held – and as *USTA* subsequently echoed in resounding terms – "*competition* is the most

[6] *See* AT&T Comments at 6 ("the three specific requirements for forbearance contained in section 10(a) . . . focus on the protection of consumers and competition").

effective means of ensuring" that a service is available on "just and reasonable" and "not unjustly or unreasonably discriminatory" terms.[7]

Unable to counter this analysis, the CLECs simply ignore it. They contend instead that SBC's Petition seeks to avoid *all* unbundling obligations and that, as a result, "unbundled loops, transport, switching and signaling . . . would not be made available *at all*."[8] That is not so. Under the *Triennial Review Order*, most such facilities remain subject to unbundling pursuant to section 251. It is only where a facility is *not* subject to unbundling – because it is "[]suitable for competitive supply" – that section 10 requires the Commission, in order to promote "'facilities-based competition' over 'parasitic free-riding,'" *CompTel*, 309 F.3d at 16 (quoting *Verizon Communications Inc. v. FCC*, 535 U.S. 467, 504 (2002)), to forbear from enforcing any additional unbundling obligations contained in section 271.

AT&T contends that forbearance in these circumstances would "rob the section 271 checklist unbundling requirements of any independent force."[9] But the time during which Congress intended those requirements to have "independent force" has long since passed. Those requirements were intended to open the local markets in the event an application for section 271 relief *preceded* Commission unbundling rules.[10] In any case, the standard against which SBC's Petition must be measured is not whether section 271's unbundling obligations would retain "independent force," but rather whether it satisfies the criteria set forth in section 10. Indeed, AT&T's test would render the Commission's forbearance authority meaningless; anytime the

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[7] Memorandum Opinion and Order, *Petition of U S WEST Communications, Inc. for a Declaratory Ruling Regarding the Provision of National Directory Assistance*, 14 FCC Rcd 16252, 16270, ¶ 31 (1999) (emphasis added).

[8] *E.g.*, Anew *et al.* Comments at 8.

[9] AT&T Comments at 31; *see* Pace Coalition Comments at 10; MCI Comments at 6.

[10] *See* Petition at 2.

Commission forbears from enforcing a particular statute or regulation, it eliminates that statute's or regulation's "independent force" as applied in a particular context. AT&T's test plainly conflicts with Congress's decision to codify the Commission's forbearance authority and, indeed, to make its exercise mandatory upon a proper showing.

AT&T also insists that the Commission's determination not to unbundle certain network elements means only "that deployment by CLECs is merely *possible*"; and that, as a result, unbundling may still be "necessary" under section 10 to protect consumers and competition.[11] But AT&T has the standard wrong. A finding of non-impairment establishes not just that an element *can be* deployed by CLECs but also that the element is "*[]suitable* for competitive supply," *USTA*, 290 F.3d at 427 (emphasis added). In view of the Act's "preference for facilities-based competition," *CompTel*, 309 F.3d at 16, in that circumstance, the Commission is statutorily bound not only to put in place regulations to encourage such "competitive supply," but also to forbear from enforcing existing requirements that would discourage it.

Relatedly, the CLECs rely upon *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001) – which did not involve the Commission's forbearance authority under section 10 – for the proposition that forbearance from unbundling obligations with respect to particular elements is inappropriate unless and until "actual competition" exists "with respect to supply of [those] network elements."[12] But, in *WorldCom*, the D.C. Circuit *upheld* the Commission's decision to grant ILECs special access pricing flexibility across *entire* MSAs, based solely on evidence of "irreversible investments in . . . facilities" in certain parts of the MSA. *See Pricing Flexibility Order*, 14 FCC Rcd 14221, ¶ 69 (1999); *WorldCom*, 238 F.3d at 459. As the Court explained, it is entirely reasonable and appropriate to "predict[]," based on evidence of competitive behavior

[11] AT&T Comments at 18.

[12] *Id.* at 34.

in a particular area, the extent of "competitive constraints upon future LEC behavior" in a much broader area. *WorldCom*, 238 F.3d at 459. It is that same approach, based on similar inferences, that SBC advocates here.[13]

Focusing on section 10(b)'s mandate to the Commission to "consider whether forbearance . . . will promote competitive market conditions," 47 U.S.C. § 160(b), the CLECs next contend that, as a rule, any step limiting mandatory access to Bell company facilities is contrary to the goal of "promot[ing] and enhanc[ing] competition."[14] Absent unbundling, they claim, "consumers will have fewer competitive alternatives."[15] Once again, this claim fails to appreciate the fact that this petition seeks forbearance from section 271 unbundling requirements only where this Commission has already concluded that CLECs are not impaired without access to the network element in question. And, in that circumstance – where the Commission had concluded that CLECs are not impaired – it necessarily has concluded that unbundling would do more harm to competition than good. It follows that refusing to order unbundling "will promote competitive market conditions." 47 U.S.C. § 160(b).[16]

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[13] AT&T also relies (at 34) on *AT&T Corp. v. FCC*, 236 F.3d 729 (D.C. Cir. 2001). There, however, the D.C. Circuit *upheld* a Commission determination – against an AT&T and WorldCom argument that "border[ed] on being disingenuous" – that its pricing flexibility analysis is sufficient to satisfy the statutory forbearance criteria. *See id.* at 737; *Petition of U S WEST Communications Inc. For Forbearance from Regulation As a Dominant Carrier in the Phoenix, Arizona MSA*, 14 FCC Rcd 19947, ¶ 2 (1999). Rather than supporting the CLECs, that case confirms that the approach advocated here – *i.e.*, relying on a finding of non-impairment to establish generally that unbundling is not necessary to protect consumers and competition – is entirely consistent with the plain language of section 10.

[14] Anew *et al.* Comments at 9-10; Covad Comments at 8.

[15] *See, e.g.*, Pace Coalition Comments at 11.

[16] The CLECs relatedly contend that any step that could raise *their* costs is necessarily contrary to the "public interest" inquiry the Commission must undertake pursuant to section 10(b). *See, e.g.*, AT&T Comments at 29-30. That claim is rooted in the mistaken impression that the *CLECs'* interest necessarily equates with the "public interest." Nor is the Commission's *1998 Biennial Review – Review of Depreciation Requirements for Incumbent Local Exchange Carriers*, 15 FCC Rcd 242 (1999), to the contrary. *See id*. at 29. There, this Commission

Moreover, the CLECs' argument ignores the insight of *USTA* that "completely synthetic" competition generated by overbroad unbundling rules *limits* competitive alternatives, by discouraging competing carriers from developing and deploying their own facilities. *See* 290 F.3d at 424. As the D.C. Circuit has explained, whether unbundling will facilitate that goal – and thereby "promote competitive market conditions," 47 U.S.C. § 160(b) – involves a balance between, on one hand, the substantial social costs of unbundling, and, on the other, the prospect of "facilitat[ing] competition by eliminating the need for separate construction of facilities where [it] would be wasteful." *USTA*, 290 F.3d at 427.

Finally, the CLECs have no tenable response to the argument that forbearance is particularly appropriate here because Commission precedent raises a substantial question whether elements that are not unbundled pursuant to section 251 are subject to the unbundling obligations in section 271 in the first place. As we have explained, the Commission has consistently held that the scope of the unbundling obligations under the competitive checklist is no more extensive than the scope of those same obligations under section 251.[17] Accordingly, the Commission has consistently granted section 271 applications – and specifically found Bell-

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rejected USTA's petition to forbear from applying its depreciation prescription rules, because, at least in part, forbearance would increase depreciation expenses that "could be translated into higher rates through exogenous adjustments and above-cap filings." 15 FCC Rcd at 268, ¶ 63. The Commission concluded, under the circumstances, that "forbearance would be likely to raise prices for interconnection and UNEs, (particularly those that may constitute bottleneck facilities)." *Id.* at 269, ¶ 63. But, once again, it is critical to recall that SBC's Petition seeks forbearance of the section 271 unbundling obligations only *after* this Commission has concluded that the particular network element is *not* a bottleneck facility – *i.e.*, that the lack of unbundled access to it poses no "barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market uneconomic." *Triennial Review Order*, 18 FCC Rcd at 17035, ¶ 84.

[17] *See* Petition at 2 & n.3 (collecting cases).

company compliance with checklist items 4 and 6 – by concluding that the applicant had complied with the Commission's regulations under section 251.[18]

Rather than respond to this argument on its terms, the CLECs mischaracterize the Commission's orders. They claim, for example that the *Qwest Nine-State Order* and the *Arkansas/Missouri Order* never addressed the scope of the unbundling obligations under checklist item 6.[19] That is false. In the *Qwest Nine-State Order*, for example, the Commission held that, "[t]o satisfy its obligations under [checklist item 6], an applicant must demonstrate compliance with Commission rules relating to unbundled local switching."[20] Moreover, in the *Arkansas/Missouri Order*, the Commission recognized that, although the Missouri Commission needed to resolve a factual dispute between the parties, the Bell company's obligations under checklist item 6 were satisfied based on the evidence in the record that it "provid[ed] line class codes on a UNE basis in Missouri and thereby complies with this aspect of its unbundled switching obligation established in the *UNE Remand Order*."[21] Other orders are to the same

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[18] *See, e.g.*, Memorandum Opinion and Order, *Application by SBC Communications Inc., et al., Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, 15 FCC Rcd 18354, 18516-117, ¶ 327 (2000), *appeal dismissed*, *AT&T Corp. v. FCC*, No. 00-1295 (D.C. Cir. Mar. 1, 2001) (deciding not to require the unbundling of the splitter under checklist item 4 because the Commission "declined to exercise [its] rulemaking authority under section 251(d)(2) to require incumbent LECs to provide access to the packet switching element," which includes the splitter); *id.* ("[t]he Commission has never exercised its legislative rulemaking authority under section 251(d)(2) to require incumbent LECs to provide access to the splitter").

[19] *E.g.*, MCI Comments at 29.

[20] *Application of Qwest Communications International, Inc. for Authorization to Provide In-Region, InterLATA Services in the States of Colorado, Idaho, Iowa, Montana, Nebraska, North Dakota, Utah, Washington, and Wyoming*, 17 FCC Rcd 26303, 26500-26501, ¶ 357 (2002).

[21] Memorandum Opinion and Order, *Joint Application by SBC Communications Inc., et al. Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd 20719, 20775, ¶ 113 (2001), *aff'd*, *AT&T Corp. v. FCC*, No. 01-1511, 2002 WL 31558095 (D.C. Cir. Nov. 18, 2002) (per curiam).

effect.[22] The CLECs' attempt to read requirements into section 271's unbundling obligations requirements that are broader than those applicable to all incumbent LECs under section 251 is flatly inconsistent with this Commission's precedent. The unbundling rules that this Commission has promulgated under section 251 have consistently been the yardstick by which the Bell companies' compliance with the separate unbundling obligations under section 271 has been measured. It follows, therefore, that, if the Commission rejects the arguments raised on reconsideration of the *Triennial Review Order* that section 271 does not apply at all, then, where the Commission determines that unbundling of a particular network element is no longer required under section 251, the Commission should forbear from requiring its unbundling under section 271.

II. Forbearance from 271 Obligations Is Particularly Appropriate with Respect to Broadband Facilities

SBC's Petition further established that forbearance from any section 271 unbundling obligations is particularly appropriate with respect to broadband facilities – including fiber-to-the-premises loops, packet switches, and the packetized capabilities of hybrid copper-fiber loops – that the *Triennial Review Order* held need not be unbundled under section 251. As the Commission explained, that decision is intended to create a "race to build next generation networks," with the result of "increased competition in the delivery of broadband services." 18 FCC Rcd at 17142, ¶ 272. Simply put, so long as the threat of unbundling pursuant to section 271 hangs over the marketplace – creating uncertainty over whether Bell companies will be permitted to reap the benefits of their investment in these new facilities and holding out hope for the CLECs that they will be permitted to free-ride on them – that race will be slowed significantly. And that, in turn, would frustrate a key goal of the *Triennial Review Order* as well

[22] *See* Petition at 2 n.3.

as of the Act itself – to "encourage the rapid deployment of new telecommunications technologies."[23]

Indeed, as SBC's Petition further explained – and as no commenter denies – the CLECs are *already* filing petitions with state commissions asking them to impose, pursuant to section 271, the exact same broadband unbundling this Commission *rejected* in the *Triennial Review Order*.[24] And the states have shown no indication that they intend to dismiss these petitions out-of-hand. Accordingly, absent decisive action by this Commission – making clear that section 271 is not a backdoor through which state commissions can undo this Commission's unbundling decisions – the Commission's efforts to create the stability and certainty necessary to justify broadband investment will be for naught.

The CLECs' primary objection to this is based on the assertion that SBC is a "*monopoly* supplier[] of last-mile broadband and next-generation capabilities."[25] This claim is astonishing. This Commission has found that "cable modem service is the most widely used means by which the mass market obtains broadband service." *Triennial Review Order*, 18 FCC Rcd at 17135-36, ¶ 262 & n.778.[26] And this Commission has recognized that "competitive LECs are leading the deployment" of fiber-to-the-premises loops, *id.* at 17145, ¶ 278, so "removing incumbent LEC unbundling obligations on FTTH loops will promote their deployment of the network infrastructure necessary to provide broadband services to the mass market," *id.*

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[23] Telecommunications Act of 1996 pmbl., Pub. L. No. 104-104, 110 Stat. 56.

[24] *See* Petition at 3-4 & n.4.

[25] AT&T Comments at 25; *see* Covad Comments at 8; Pace Coalition Comments at 13; Sprint Nov. 17 Comments at 14.

[26] *See also* Industry Analysis and Technology Division, Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of December 31, 2002* at Table 5 (June 2003).

AT&T nevertheless contends that the relief SBC seeks is inappropriate because it would result in no unbundling requirement for broadband facilities that the Commission has found *do* meet the impairment standard.[27] In particular, AT&T claims that the Commission found impairment with respect to the broadband capabilities of hybrid copper-fiber loops but that it nevertheless declined to unbundle those capabilities in the interest of encouraging ILECs "to deploy such facilities."[28] That is a misreading of the *Triennial Review Order*. In fact, the Commission found impairment only where a CLEC would be without any alternative to provide narrowband services to the mass market. 18 FCC Rcd at 17148, ¶ 286. And the Commission specifically found suitable alternatives to an intrusive unbundling approach where the ILEC provides "unbundled access to subloops, spare copper loops, and the non-packetized portion of incumbent LEC hybrid loops." *Id.* The Commission thus struck a balance between requiring the unbundling of these facilities for *narrowband services* – incumbents must provide "an entire non-packetized transmission path capable of voice-grade service (*i.e.*, a circuit equivalent to a DS0 circuit) between the central office and [the] customer's premises," *id.* at 17153, ¶ 296 – while refraining from unbundling these facilities to provide *broadband services* – "the next-generation network, packetized capabilities of their hybrid loops to enable requesting carriers to provide broadband services to the mass market," *id.* at 17149, ¶ 288.[29] Contrary to AT&T's claim, the Commission found no impairment without access to these facilities with respect to broadband services, and there is no reason to reach a different conclusion under section 271.

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[27] *See* AT&T Comments at 20, 21-23.

[28] *Id.* at 21 (citing *Triennial Review Order*, 18 FCC Rcd at 17148, ¶ 286, 17150, ¶ 290).

[29] "[I]ncumbent LECs remain obligated, however, to provide unbundled access to the features, functions, and capabilities of hybrid loops *that are not used to transmit packetized information*." *Triennial Review Order*, 18 FCC Rcd at 17149, ¶ 289 (emphasis added).

The CLECs also contend that forbearance from broadband unbundling is inappropriate because consumers are increasingly seeking "both traditional and new broadband services over a single line from a single provider."[30] The theory here is that, absent unbundling, CLECs would be unable to offer a competing package, thus limiting consumer choice. This is not true. The availability of line splitting, together with the opportunity to enter into commercial line-sharing arrangements, significantly undermines the CLECs' argument that forbearance would somehow deprive them of the ability to compete in the broadband market. Indeed, just yesterday, AT&T announced that it offers broadband service pursuant to line splitting, "utiliz[ing] a nationwide data network provided by Covad," to consumers in 11 states "and plans to roll out the service in all states in which it provides . . . residential services."[31]

Moreover, contrary to the CLECs' claims, it is the *cable companies* – not the ILECs – that are leaders in providing broadband/data (and video) bundles. Aside from their dominance in the broadband and video arenas, cable companies are currently providing cable telephony to millions of homes,[32] and this is likely to increase substantially as they continue to deploy commercial voice-over-Internet-protocol services.[33]

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[30] AT&T Comments at 27.

[31] AT&T Press Release, *AT&T Adds DSL Service to Communications Bundle in Ohio*, Dec. 11, 2003.

[32] *See, e.g.*, Comcast Press Release, *Comcast Full Year and Fourth Quarter Results Meet or Exceed All Operating and Financial Goals* (Feb. 27, 2003); Cox Communications Press Release, *Cox Communications Announces Fourth Quarter Financial Results for 2002; Strong Demand for Cox's Digital Services Builds Solid Foundation for Continued Growth in 2003* (Feb. 12, 2003); Reply to Comments and Petitions to Deny Applications for Consent to the Transfer Control of AT&T Corp. and Comcast Corp. at 11, *Applications for Consent to the Transfer of Control of Licenses of Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee*, filed in MB Docket No. 02-70 (May 21, 2002) ("AT&T Broadband is capable of serving approximately seven million households, has enrolled over 1.15 million cable telephony customers, and is adding approximately 40,000 customers every month.").

[33] *See, e.g., Time Warner to Use Cable Lines to Add Phone to Internet Service*, N.Y. Times (Dec. 9, 2003) (Time Warner's deal with Sprint and MCI to offer VOIP service by the end

The CLECs have no answer, moreover, to the indisputable fact that forbearance will encourage SBC more actively to deploy broadband facilities and thus provide a competitive counterbalance to the dominant cable incumbents. Particularly with respect to next-generation packet-switched networks, the application of section 271 unbundling obligations would require time-consuming and expensive re-design of integrated fiber network architectures to provide access to sub-"elements" that have yet to be created, and it would also require SBC to develop additional operational systems to support CLEC access to the next-generation technologies that the Commission has held CLECs are equally capable of deploying.[34] The decision to forbear from enforcing any section 271 unbundling obligations will eliminate any such requirements and thus speed the deployment of broadband facilities.

In the CLECs' view, however, these undeniable public interest benefits are beside the point. As they see it, the Commission's conclusion in the *Triennial Review Order* that section 271 imposes unbundling obligations independent of section 251 is the end of this inquiry.[35] But that is clearly wrong. Whether section 271's unbundling requirements continue to apply to the Bell companies says nothing about whether, under the mandatory criteria of section 10, this Commission must nevertheless forbear from applying those requirements to the extent it has already concluded that there is no unbundling requirement under section 251. Indeed, if the Commission found – incorrectly, in SBC's view – that section 271 continues to apply as a statutory matter even after there is no longer an unbundling requirement under section 251, such a decision would *compel*, not preclude, forbearance.

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of 2004 "shows how quickly cable companies are transforming themselves into all-purpose telecommunications providers").

[34] *See* Petition at 9-10.

[35] *See* AT&T Comments at 22; Anew *et al.* Comments at 3-5; Covad Comments at 1-4; Pace Coalition Comments at 8-10; Z-Tel Letter at 2; MCI Comments at 8-9.

In addition, there is *no* evidence in the *Triennial Review Order* that this Commission's determination not to unbundle broadband facilities under section 251 was contingent on the continued application of such obligations pursuant to section 271. On the contrary, the Commission was unequivocal that, "with the certainty that their fiber optic and packet-based networks will remain free of unbundling requirements, incumbent LECs will have the opportunity to expand their deployment of these networks, enter new lines of business, and reap the rewards of delivering broadband services to the mass market." 18 FCC Rcd at 17141, ¶ 272. It would completely undermine this Commission's intention to stimulate deployment of broadband facilities to reimpose (pursuant to section 271) the very unbundling obligations that the Commission wisely elected not to impose pursuant to section 251. Moreover, at the time the Commission released the *Triennial Review Order*, it was considering a Verizon petition prospectively seeking forbearance from any section 271 unbundling obligations for elements that the Commission declined to unbundle pursuant to section 251. It is therefore inconceivable that the Commission would have simply *assumed* that any such unbundling obligations would continue indefinitely.

AT&T argues to the contrary, noting the Commission's "'expect[ation] that incumbent LECs will develop wholesale service offerings for access to their fiber feeder to ensure that competitive LECs have access to copper subloops.'"[36] By its terms, however, the Commission's statement refers to the unremarkable fact that, because of the intensely competitive nature of the broadband market, ILECs have every incentive to keep as much traffic as possible on their own networks and therefore every incentive to create wholesale relationships to accomplish that end. But such *voluntary* arrangements are a far cry from *mandatory* unbundling obligations –

[36] AT&T Comments at 22 (quoting *Triennial Review Order*, 18 FCC Rcd at 17131-32, ¶ 253); *see* Pace Coalition Comments at 14.

complete with price regulation in some unspecified form and the "complex issues of managing shared facilities," *USTA*, 290 F.3d at 427.[37]

As SBC explained in the Petition, moreover, forbearance in the broadband context is further supported by section 706's express mandate to encourage deployment of "advanced telecommunications capabilit[ies]" by using "methods that remove barriers to infrastructure investment."[38] There can be no question that unbundling is a "barrier[] to [the] infrastructure investment" necessary to deploy new broadband facilities – indeed, the D.C. Circuit in *USTA* already held as much. *See* 290 F.3d at 429. Thus, as the Commission squarely held in the *Triennial Review Order*, section 706 strongly supports the decision *not* to unbundle broadband facilities. *See* 18 FCC Rcd at 17145, ¶ 278, 17323, ¶ 541. By the same logic, the same provision strongly supports the exercise of the Commission's forbearance authority to decline to enforce any section 271 unbundling obligations to broadband facilities that the Commission has said need not be unbundled pursuant to section 251.

The CLECs dispute that result, reasoning that, as a statutory matter, "section 706 is *irrelevant* to the scope of a BOC's access obligations under section 271."[39] That is so, the theory goes, because, section 271 does not contain the same "at a minimum" clause that the Commission has relied upon in connection with section 251 to look beyond the impairment inquiry to determine whether unbundling would frustrate the goals of section 706.

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[37] In any event, if the CLECs were correct that the Commission was referring in paragraph 253 to unbundling obligations pursuant to section 271, it would have discussed these as "Bell-company" obligations. Instead, it expected that "incumbent LECs" in general would be developing these wholesale offerings. *See Triennial Review Order*, 18 FCC Rcd at 17131-32, ¶ 253.

[38] Telecommunications Act of 1996, Pub. L. No. 104-104, § 706(a), 110 Stat. 56, 153, *reprinted at* 47 U.S.C. § 157 note.

[39] AT&T Comments at 23; *see* Sprint Nov. 17 Comments at 10; Z-Tel Letter at 2; MCI Comments at 14.

This argument misses the point entirely. Section 706 is relevant in this context not to the proper construction of section *271*, but rather to the proper application of the Commission's forbearance authority pursuant to section *10(a)*. And, as the Commission has already held, far from being "irrelevant" to that question, section 706 is central to it. In particular, the *Advanced Services Report and Order* squarely held that "section 706(a) directs the Commission to use the authority granted in other provisions, *including the forbearance authority under section 10(a)*, to encourage the deployment of advanced services."[40]

Finally, AT&T makes the remarkable claim that "unbundling imposed by section 271" would have no "material impact on SBC's investment incentives."[41] But AT&T has elsewhere argued the precise opposite. It has recognized the "universally accepted economic and public policy" principle that forced access discourages investment.[42] Indeed, AT&T has conceded that "[t]he prospect of regulation alone is enough to dampen investment" and that "[u]nnecessary access regulation would also deter innovation," which would be "devastating to the deployment of broadband services."[43] AT&T has further acknowledged that

> [t]he imposition of a rigid, forced access mandate would stunt the ability of companies to adjust to technological advances and changing consumer needs, discourage innovation, preclude parties from entering agreements tailored to their particular needs, inhibit the investment necessary to the continued development of new technologies and rapid deployment of broadband capabilities, and divert substantial resources to technical and operational problems stemming from regulatory compliance.[44]

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[40] Memorandum Opinion and Order, and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24044-45, ¶ 69 (1998) (emphasis added).

[41] AT&T Comments at 24; *see also* MCI Comments at 18-19.

[42] AT&T Open Access Comments at 42, 68-69.

[43] *Id.* at 69.

[44] *Id.* at 68.

These principles do not vanish merely because the pricing of facilities unbundled pursuant to section 271 is to be governed by sections 201 and 202, instead of by TELRIC.[45] As SBC explained in its Petition, it is not clear how the Commission intends to apply those sections to any network elements made available under section 271. But, however it does so, one thing is clear: as the D.C. Circuit has explained, *all* regulated prices – even those that only "*seem* to equate to cost" – have the effect of reducing or eliminating incentives to invest for ILECs and CLECs alike. *USTA*, 290 F.3d at 424.

III. The Commission Has the Legal Authority to Forbear From Requiring the Unbundling of a Network Element Under Section 271 that No Longer Needs to be Unbundled Under Section 251

Unable to deny that SBC's Petition satisfies the statutory forbearance criteria – and that section 10 accordingly mandates that the Commission "shall" forbear from applying any independent section 271 unbundling obligations to elements the Commission has declined to unbundle for purposes of section 251 – the CLECs spend the bulk of their energies claiming instead that the Commission is statutorily foreclosed from providing that relief.

First, and most broadly, the CLECs contend that section 271(d)(4) forecloses the Commission from forbearing – *ever* – from enforcing any independent unbundling obligations in section 271.[46] That section prevents the Commission from "limit[ing] or extend[ing] the terms used in the competitive checklist." 47 U.S.C. § 271(d)(4). But this section simply directs the Commission to ensure full implementation of the competitive checklist *before* granting an application under section 271; in reviewing an application, it can neither add to nor subtract from the specified list of requirements. Once the Commission grants an application, it has necessarily

[45] *See* AT&T Comments at 24-25.

[46] *See* AT&T Comments at 10; Anew *et al.* Comments at 5-7; Covad Comments at 4-5; Pace Coalition Comments at 2-3; Sprint Nov. 17 Comments at 6.

found the checklist requirements to have been "fully implemented" under section 271(d)(3)(A)(i). At that point, the requirements are eligible for forbearance under section 10(a).

Indeed, section 10 itself plainly contemplates that the Commission *can* on a proper showing forbear from enforcing the requirements of section 271. It provides specific language qualifying the Commission's general forbearance mandate – *i.e.*, establishing that it cannot exercise such authority with respect to section 271 *until* the requirements in question have been "fully implemented." *See* 47 U.S.C. § 160(d). It is impossible to understand why Congress would have included this qualification, if, as the CLECs contend, Congress intended to foreclose the Commission from forbearing from the requirements of the competitive checklist under *any* circumstances. As MCI concedes, the Commission must "'give effect, if possible, to every clause and word of a statute.'" MCI Comments at 9 (quoting *United States v. Menasche*, 348 U.S. 528, 538-39 (1955)).

Second, the CLECs contend that section 10(d)'s reference to the requirements having been "fully implemented" establishes that the Commission "cannot forbear from applying *any* requirement of section 251(c) or section 271 until *all* of the requirements of section 251(c) and section 271 have been 'fully implemented.'"[47] This is wrong. Congress chose the same phrase – "fully implemented" – to describe both the condition that must be satisfied before section 271 relief is granted and the condition that must be satisfied before the Commission's forbearance authority may be invoked. This "presents a classic case for application of the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning." *Commissioner v. Lundy*, 516 U.S. 235, 250 (1996) (citing *Sullivan v.*

[47] AT&T Comments at 12; Anew *et al.* Comments at 7-8; Covad Comments at 5-7; Pace Coalition Comments at 3-6; Z-Tel Letter at 2-3; MCI Comments at 19-22.

Stroop, 496 U.S. 478 (1990); *Sorenson v. Secretary of Treasury*, 475 U.S. 851, 860 (1986)) (internal quotation marks omitted).

In any case, the Commission itself has recently rejected the argument that section 10(d) prohibits it from forbearing from *any* particular section 271 requirement until section 271 *as a whole* has been "fully implemented." In the *OI&M Forbearance Order*, the Commission held that section 10(d) barred it from forbearing from applying section 272's requirements because those requirements – which, according to the Commission, were incorporated by reference into section 271 – had not yet been "fully implemented."[48] The Commission recognized, however, that its analysis "applies only to whether section 271 is 'fully implemented' with respect to the cross-referenced requirements of section 272, and does not address whether *any other part of section 271, such as the section 271(c) competitive checklist*, is 'fully implemented.'"[49]

That result, moreover, is compelled by the statutory text. Section 10(d) itself makes clear that only "*those* requirements" from which the Bell company petitioner seeks forbearance must be "fully implemented" before the Commission is authorized to forbear. *See* 47 U.S.C. § 160(d). Full implementation of the competitive checklist is, as AT&T itself explains, a "*precondition*" to obtaining long-distance authority.[50] Once that "precondition" is satisfied – which must happen *prior to* a grant of section 271 relief – the competitive checklist is "fully implemented" for purposes of *both* section 271 *and* section 10(d).

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[48] Memorandum Opinion and Order, *Petition of Verizon for Forbearance from the Prohibition of Sharing Operating, Installation, and Maintenance Functions Under Section 53.203(a)(2) of the Commission's Rules*, CC Docket No. 96-149, FCC 03-271, ¶ 5 (rel. Nov. 4, 2003) ("*OI&M Forbearance Order*").

[49] *Id.* ¶ 6 (emphasis added).

[50] AT&T Comments at 7 (emphasis added).

The CLECs contend that this plain reading of the statute leads to "absurd" results.[51] Specifically, they contend that this reading would permit the Commission, at "the very *moment* after granting a BOC long distance authority," to cease enforcement of the Bell companies' "continuing compliance with sections 251(c) and 271."[52] But that is not at all what SBC is arguing. Granting section 271 relief only means that the requirements of the competitive checklist have been fully implemented and that section 10(d) no longer presents a bar to this Commission's forbearing from the requirements of section 271. It is still necessary to justify forbearance under the standards of section 10(a). What is more, as explained above and in the Petition, the Commission's own section 271 orders *uniformly* limit the scope of their review of Bell company applicants' compliance with the competitive checklist to their compliance with the unbundling obligations imposed pursuant to section 251. It is hardly "absurd" to forbear from enforcing a purported requirement in the wake of section 271 relief where the Commission did not see fit to enforce that same requirement when reviewing the 271 application in the first place.

In any case, even if it were somehow unreasonable to assign the same meaning to the phrase "fully implemented" as it appears in different sections of the Act, once this Commission has decided that a particular network element no longer needs to be unbundled under the standards of section 251(d)(2), then at the very least it is reasonable to conclude that the checklist item corresponding to that network element in particular has been "fully implemented." Indeed, that conclusion flows logically from the *OI&M Forbearance Order*, in which the Commission concluded that different requirements under section 271 may become "fully implemented" at different times.[53]

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[51] *Id.* at 15; *see* MCI Comments at 21.

[52] AT&T Comments at 15-16; *See* Covad Comments at 5.

[53] *See OI&M Forbearance Order* ¶ 6.

Finally, the CLECs argue that forbearance under these circumstances would be contrary to the Commission's repeated pledges in the section 271 context to use section 271(d)(6) to monitor SBC's ongoing compliance with section 271.[54] But forbearance has nothing to do with SBC's continuing obligations to comply with the remaining requirements of section 271. If the Commission has concluded under section 251(d)(2) that a particular network element need not be unbundled, SBC should not be required to unbundle it under section 271. In every other respect, however, SBC would be obligated under section 271(d)(6) to remain in compliance with the requirements of section 271. The relief requested is limited, and this Commission retains its full authority to enforce all of the remaining obligations of section 271 (including those aspects of the competitive checklist that would be unaffected by granting this Petition) under section 271(d)(6).[55]

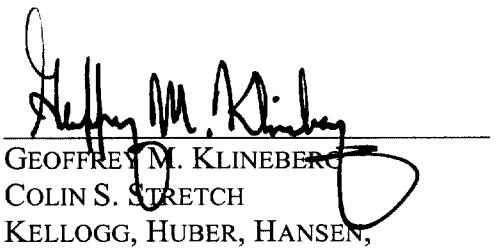
[54] *See* AT&T Comments at 14; Anew *et al.* Comments at 6; Covad Comments at 6; Z-Tel Letter at 3.

[55] Anew and others contend that SBC's Petition should be denied because it is similar to the Verizon petition that the Commission denied last month. *See* Anew *et al.* Comments at 2-3. But these commenters fail to acknowledge that Verizon specifically *withdrew* the narrowband portion of its petition before the Commission had acted. As for the Commission's denial of the broadband portion of that petition, that was based on the Commission's belief that Verizon had filed a *new* forbearance petition seeking the same relief. Those circumstances are not present here, and the Commission's treatment of Verizon's prior petition has no relevance to SBC's separate Petition.

CONCLUSION

The Commission should grant the Petition.

Respectfully submitted,



GEOFFREY M. KLINEBERG
COLIN S. STRETCH
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1615 M Street, N.W., Suite 400
Washington, D.C. 20036-3209
(202) 326-7900

GARY L. PHILLIPS
CHRISTOPHER HEIMANN
SBC COMMUNICATIONS INC.
1401 I Street, N.W.
4th Floor
Washington, D.C. 20005
(202) 326-8903

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